Office-Supreme Court, U.S.
FILED
MAR 14 1983
ALEXANDER L. STEVAS,
CLERK

82-1374

No. .....

In The

Supreme Court of the United States

October Term, 1982

KATHY RIVINIUS AND RONALD WEIKUM,
Petitioners,

vs.

STATE OF NORTH DAKOTA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the decision of the North Dakota Supreme Court violated any religious rights guaranteed to the petitioners by the First Amendment to the United States Constitution?

(2) Whether the decision of the North Dakota Supreme Court decides a federal question in a way which conflicts with the decision of another state court of last resort, a federal court of appeals, or in any way conflicts with applicable decisions of this Court?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

RESPONDENT'S BRIEF IN OPPOSITION

The Attorney General of the State of North Dakota, on behalf of the State of North Dakota, respectfully requests this Court to deny the Petition for Writ of Certiorari which seeks the review of the decision of the Supreme Court of the State of North Dakota in this case. This Brief in Opposition is submitted pursuant to Rule 22 of the United States Supreme Court.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the North Dakota Constitution, the United States Constitution, and the North Dakota Century Code are involved in the questions presented:

UNITED STATES CONSTITUTION

U. S. Const. amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

NORTH DAKOTA CONSTITUTION

N. D. Const. art. I, § 3:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state, and no person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

N. D. Const. art. VIII, §§ 1, 2, 3, and 4:

Section 1. A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the State of North Dakota and free from sectarian control. This legislative requirement shall be irrevoc-

able without the consent of the United States and the people of North Dakota.

Section 2. The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up to and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education.

Section 3. In all schools instruction shall be given as far as practicable in those branches of knowledge that tend to impress upon the mind the vital importance of truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind.

Section 4. The legislative assembly shall take such other steps as may be necessary to prevent illiteracy, secure a reasonable degree of uniformity in courses of study, and to promote industrial, scientific, and agricultural improvements.

NORTH DAKOTA CENTURY CODE

N. D. Cent. Code § 15-41-24:

The following units of study shall be made available to all students in each public and private high school in this state at least once during each four-year period, and each private high school shall comply with the requirements of this section if such high school is to receive approval by the department of public instruction:

1. English, four units.
2. Mathematics, three units.
3. Science, four units.
4. Social studies, three units.
5. Health and physical education, one unit.
6. Music, one unit.

7. Any combination of the following course areas: business education, economics, and the free enterprise system, foreign language, industrial arts, vocational education, six units. For purposes of this subsection vocational education shall include home economics, agriculture, office education, distributive education, trade industrial, technical, and health occupations.

Each public or private or public high school may count for purposes of compliance with this section those vocational education courses which are offered through cooperative arrangements approved by the state board of vocational education.

N. D. Cent. Code § 15-36-01:

The superintendent of public instruction, after consulting with the teachers' professional practices commission, shall determine the criteria for teacher certification for school terms beginning on or after July 1, 1974. The established criteria shall be based upon standards which shall include considerations of character, adequate educational preparation, and general fitness to teach in the public schools of this state. After holding a public hearing thereon, the superintendent shall issue rules and regulations concerning the issuance of teachers' certificates, and such certificates shall be issued by his office in accordance with such rules and regulations. However, any teacher who has graduated from college in an accredited teacher education program on or before September 1, 1980, shall not be required to earn any college credits in native American or other multicultural courses in order to be certified or recertified. Nothing in this section shall be interpreted to affect the validity of life certificates in existence on July 1, 1973, nor shall this section affect vocational education certificate qualifications as provided in chapter 15-20.1.

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STATEMENT OF THE CASE

On October 9, 1980, petitioners Kathy Rivinius and Ronald Weikum were charged with violating Section 15-34.1-01 of the North Dakota Century Code for sending their children to Living Word Academy, a school that is not approved by the County Superintendent of Schools and the Superintendent of Public Instruction of the State of North Dakota as required by Section 15-34.1-03 (1), N. D. C. C. The action was brought in Grant County Justice Court, but was transferred to the Sioux County Justice Court after the petitioners filed an affidavit of prejudice against the Grant County Justice hearing the case.

On September 9, 1981, trial was held before the Sioux County Justice on this charge. The petitioners argued that their religious beliefs would be violated should they send their children to a school utilizing certified teachers.

> Defendant Weikum was the only Defendant to testify at trial. His concern was that a certified teacher, in the process of becoming certified, would follow required courses and learn teaching techniques from a state as opposed to a religious perspective. That such learning would taint the teachers preventing him from teaching according to Living Word Academy Doctrines. (See App. C, at App. 34, of Petitioners' Brief.)

However, the Sioux County Justice, in reviewing the entire record, found it difficult to understand the petitioners' contention that the North Dakota Compulsory School Attendance Law unduly burdened their exercise of religious beliefs.

> And further, at p. 281 of the Stipulated Transcript, Reverend Kiester indicates that it would be pos-

> sible for a state teacher graduate to teach at Living Word Academy. Dr. Rushdonny, in the Stipulated Transcript, also indicates that a teacher, depending on which one, could graduate from the state school and still teach in a Christian school. Based upon this record, although it may be difficult to locate a satisfactory certified teacher for Living Word Academy, such a task is not an undue burden. According to Ronald Stastnay, North Dakota does not dictate the certified teacher's teaching methods or prospectives. The teacher would be free to instruct from a religious basis, and in accordane (sic) with the Living Word Academy requirements. (See App. C, at App. 34-5, of Petitioners' Brief.)

As a result, the Defendants were found guilty of violating North Dakota's Compulsory School Attendance Law.

The petitioners appealed that judgment to the South Central Judicial District Court in Grant County, North Dakota. On May 14, 1982, District Court Judge William F. Hodny found the Defendants guilty for violating North Dakota's Compulsory School Attendance Law. In arriving at this conclusion, the Court stated as follows:

> This is direct authority [State v. Shaver, 294 N. W. 2d 883 (N. D. 1980)] requiring this Court to conclude that the State of North Dakota has a compelling interest in the school attendance law Defendants are charged with having violated, justifying the burden imposed on the free exercise of free religion, and that the means employed are the least restrictive. I would tend to agree with Justice VandeWalle's concurring opinion indicating teacher certification is less restrictive to the free exercise of religion than would be compulsory testing of students. (See App. B, at App. 29-30 of Petitioners' Brief.)

The petitioners appealed the judgment of the District Court to the North Dakota Supreme Court. The North

Dakota Supreme Court handled this appeal as it did in *State v. Shaver,* 294 N. W. 2d 883 (N. D. 1980) which also raised the identical issues raised by petitioners. That is to say, the Supreme Court of the State of North Dakota evaluated the claims of the petitioners as to possible constitutional violations as a result of the enforcement of North Dakota Compulsory School Attendance Law using the three-prong analysis set down by this Court in *Wisconsin v. Yoder,* 406 U. S. 205 (1972). The North Dakota Supreme Court, in the case at hand, concluded that the belief of the petitioners was a sincerely held belief, but concluded that those beliefs were not unduly burdened by enforcement of the State's Compulsory School Attendance Law. 328 N. W. 2d at 227. Furthermore, the Court concluded that the State's compelling interest in the enforcement of the Compulsory School Attendance Law justified any burden placed upon the petitioners' free exercise of religion.

> "We believe the stated constitutional mandate and objective establishes the compelling state interest and outbalances the resulting strain or imposition on the defendants' religious beliefs. Under the posture of this case we have available to us no other viable alternatives." 328 N. W. 2d at 229.

The opinion of the North Dakota Supreme Court was rendered December 17, 1982. Rule 40 of the North Dakota Rules of Appellate Procedure provides for a petition for rehearing to be filed within 14 days after entry of the judgment. Petitioners, for whatever reasons, decided against filing for a petition for rehearing before the North Dakota Supreme Court. Instead, petitioners have gone directly to the United States Supreme Court.

REASONS WHY THE WRIT SHOULD BE DENIED

A. The Decision Of The North Dakota Supreme Court Does Not Violate Any Religious Rights Guaranteed To The Petitioners By The First Amendment To The United States Constitution.

The affirmance by the North Dakota Supreme Court of the District Court's conviction of petitioners for violating the State of North Dakota's Compulsory School Attendance Law is in compliance with the First Amendment to the United States Constitution as interpreted by this Court. The decision is also in compliance with the North Dakota Constitution.

Petitioners characterize this decision as "abhorrent" because the North Dakota Supreme Court gave "high respect and regard" for the petitioners' religious beliefs. Apparently, the petitioners are of the opinion that a court of law cannot respect and give regard to those beliefs profounded by the party to a lawsuit and yet find those individuals in violation of the law. Petitioners are unable to provide legal authority for the implication contained in their brief that persons whose religious beliefs are given "high respect and regard" by a court of law cannot be found in violation of a state's compulsory school attendance law.

Although the freedom to hold religious beliefs is absolute, the freedom to act, even if the action is in accordance with religious convictions, is not totally free from legislative restrictions. See, e. g., *Sherbert v. Verner,* 374 U. S. 398 (1963) [denial of unemployment compensation benefits to Seventh-Day Adventists restricted free exercise

of religion and state's interest did not justify restriction]; *Braunfeld v. Brown,* 366 U. S. 599 (1961) [free exercise of religion not violated by Sunday closing law]; *Prince v. Commonwealth of Massachusetts,* 321 U. S. 158 (1944) [statute prohibiting children under specified age from selling newspapers, magazines, or periodicals in public street did not violate the exercise of religion]; *Reynolds v. The United States,* 98 U. S. 145 (1879) [statute prohibiting polygamy did not violate free exercise of religion]; *State v. Shaver,* 294 N. W. 2d 883 (N. D. 1980) [compulsory school attendance law did not violate free exercise of religion].

In *Wisconsin v. Yoder,* 406 U. S. 205 (1972), this Court formulated a three-prong analysis to determine whether or not Wisconsin's Compulsory School Attendance Law was unconstitutional as applied to Amish parents. The three-prong analysis in *Yoder* involved a determination of:

1. Whether or not the activity interfered with the State was motivated by and rooted in a legitimate and sincerely held religious belief;
2. Whether or not the parties' free exercise of religion had been burdened by the regulation, and the extent or impact on their religious practices; and
3. Whether or not the State had a compelling interest in the regulation in which justified the burden on the free exercise of religion. 406 U. S. at 215-34.

The State of North Dakota, the petitioners, and all of the lower courts which heard this dispute agreed that the three-prong analysis of *Yoder* must be followed in resolving this case. There was never any attempt or sug-

gestion to use a different method to determine these constitutional issues raised by the parents involving this matter.

This is not the first time the North Dakota Supreme Court has heard a challenge to North Dakota's Compulsory School Attendance Law involving the free exercise of religion. In *State v. Shaver*, 294 N. W. 2d 883 (N. D. 1980), the North Dakota Supreme Court faced the identical issues raised in this case. Indeed, counsel for the petitioners in the case at hand also represented the parents in *Shaver*.

In *Shaver*, the North Dakota Supreme Court made it quite clear that the three-prong analysis of *Yoder* would be used to resolve the constitutional challenges made by the parents.

> We will apply the constitutional analysis and approach utilized in *Yoder* to the instant case. 294 N. W. 2d at 891.

In applying the three-prong analysis of *Wisconsin v. Yoder, supra,* to *State v. Shaver, supra,* the North Dakota Supreme Court noted the observation of this Court in *Yoder* where it is stated that:

> *Pierce* [268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925)] of course, recognized that where nothing more than the general interest of the parent and the nurture and education of his children are involved, it is beyond dispute that the State acts "reasonably" and constitutionally in requiring education to age 16 in some public or private school meeting the standards described by the State. 406 U. S. at 233, 92 S. Ct. at 1542.

The North Dakota Supreme Court made the following conclusion based upon this observation by this Court in *Yoder*:

> For this reason, we believe that the right of parents to direct the upbringing and education of the children is subject to reasonable state regulation pursuant to the state's police powers. We have not been shown wherein the State's laws are unreasonable. 294 N. W. 2d at 899.

The outcome of *Shaver* was an affirmance of the parents' conviction for violating the State's Compulsory School Attendance Law. The North Dakota Supreme Court reviewed the record on appeal and found no attempt by the parents to show how compliance with the compulsory school attendance law would affect the religion of the parents or their children.

> A perusal of the record, however, fails to disclose a deeply-rooted religious conviction against the use of certified teachers in the Bible Baptist School. 294 N. W. 2d at 894.

The case at hand received the same analysis by the North Dakota Supreme Court as was employed in *Shaver*. The constitutional analysis in approach utilized in *Wisconsin v. Yoder, supra,* was applied to resolve the conflict between the State's interests in the education of its youth and the fundamental rights and interests protected by the free exercise clause of the First Amendment.

In applying the *Yoder* three-prong analysis to the case at hand, the North Dakota Supreme Court concluded that the parents' religious beliefs were sincerely held (prong No. 1), but concluded that the burden placed upon

the parents' religious beliefs were not of the magnitude demonstrated in *Wisconsin v. Yoder, supra* (prong No. 2).

> The record reflects that at least one of the teachers employed at Living Word Academy was, or had been, certified in Oklahoma. The record also reflects that teachers employed at Living Word Academy were "certifiable" in North Dakota. The testimony of Rev. David Keister reflects that Living Word Academy would not necessarily forbid certified teachers, but a certified teacher would have to disavow certification to teach at Living Word Academy. Rev. Keister testified that the qualifications to teach at Living Word Academy included satisfying spiritual qualifications through an interviewing procedure and also satisfying competency qualifications.
>
> The record further reflects that although the law dictates the curriculum that schools must offer, the law does not dictate, nor does the state regulate, the perspective from which the subjects must be taught. Rather, the manner in which the teachers teach their students is defined and controlled by the local school board or the lay controlling board. 328 N. W. 2d at 227.

Nevertheless, the North Dakota Supreme Court gave the petitioners the benefit of the doubt and reached the third prong of a *Yoder* analysis. The Court considered the compelling interest of the State of North Dakota in education and the method chosen by the State to carry out that compelling interest.

> There can be no doubt as to the importance of education for our youth. See, *e. g., Brown v. Board of Education,* 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). Neither can there be any doubt, and the defendants concede, that the state has an interest in educating its youth. *Wisconsin v. Yoder, supra; Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary,* 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed.

1070 (1925); *Meyer v. Nebraska,* 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923). 328 N. W. 2d at 227.

The North Dakota Supreme Court concluded that the State's compelling interests in the education of its youth was not being unreasonably pursued by way of the Compulsory School Attendance Law. More specifically, the Court concluded that although teacher certification may have its deficiencies, it is an acceptable method of satisfying a part of the constitutional mandate to the legislature to properly provide an education for the youth of the State. Furthermore, the Court pointed out that a decision to replace the teacher certification requirements should be made by the legislature rather than the courts. 328 N. W. 2d at 231.

> If a better solution is available which will have an even lesser effect on the religious beliefs than the present law under consideration, it should be through the legislative process. 320 N. W. 2d at 231.

In *Wisconsin v. Yoder, supra,* the Amish successfully showed that the impact of Wisconsin's Compulsory School Attendance Law on Amish religious practices was severe and would require the Amish parents "to perform acts undeniably at odds with sentimental tenents of their religious beliefs." 404 U. S. at 218. The degree of the burden on the religious practice is an important consideration which this Court and the North Dakota Supreme Court went to great lengths to emphasize. This Court distinctly pointed out that compulsory school attendance for the Amish beyond the eighth grade would not merely offend "important Amish religious tenents from a subjective point of view," but would pose "a very real threat of

underminding the Amish community and religious practice as they exist today." 406 U. S. at 218.

Simply put, the parents in this case have failed to make a showing of severe burden and undue infringement similar to that made in *Wisconsin v. Yoder, supra.* The record before the North Dakota Supreme Court contained inconsistent and contradictory testimony by these parents as to why they objected to the State's Compulsory School Attendance Law and how this law burdened their religious practices. The North Dakota Supreme Court noted that the parents objected to the requirement of certified teachers, and yet sent their children to Living Word Academy where a certified teacher was employed. 328 N. W. 2d at 227. It is incumbent upon these petitioners to show the coercive effect of the compulsory school attendance law upon their religious practices. *Abington School Dist. v. Schempp*, 374 U. S. 203 (1963). Based upon the record before the North Dakota Supreme Court, these petitioners simply failed to show such a coercive effect.

The petitioners insist that the North Dakota Supreme Court has done them great harm in this dispute. Yet, given the facts of the case, especially the less than convincing testimony as to any burden placed upon the parents, the North Dakota Supreme Court really had no other choice.

> We believe the stated constitutional mandates and objective establishes the compelling state interest and outbalances the resulting *strain or imposition* upon the defendants' religious beliefs. Under the posture of this case we have available to us no other viable alternatives. (Emphasis supplied.) 328 N. W. 2d at 229.

B. The Decision Of The North Dakota Supreme Court Has Not Decided A Federal Question In A Way Which Is In Conflict With The Decision Of Another State Court Of Last Resort, A Federal Court Of Appeals, Or Is In Any Way In Conflict With Applicable Decisions Of This Court.

The decision of the North Dakota Supreme Court was rendered after applying the three-prong analysis of *Wisconsin v. Yoder, supra.* Indeed, as earlier pointed out, this is the second time the North Dakota Supreme Court has had the occasion to face this issue and both times applied the analysis of *Wisconsin v. Yoder.* High courts of other states have analyzed similar disputes in exactly the same manner. See *State v. Riddle,* 285 S. E. 2d 359 (W. Va. 1981); *Douglas v. Faith Baptist Church,* 301 N. W. 2d 571 (1981), *dismissed* 454 U. S. 803 (1981).

The petitioners, in their brief, have attempted to give the appearance that the decision rendered in this case by the North Dakota Supreme Court conflicts with the decision of other state courts considering the same issue. (*See* Petitioners' Brief, p. 16.) After examining the cases cited by petitioners, however, the conflicts they attempt to create simply fail to materialize. In *Kentucky State Board, et al. v. Rudasill,* 589 S. W. 2d 877 (Ky. 1979), *cert. denied,* 446 U. S. 938 (1980), the Kentucky Supreme Court dealt with a section of the Kentucky Constitution which provided that no person may be compelled to send his child to any school to which he may be conscientiously opposed. Such a constitutional provision does not exist in the North Dakota Constitution and Respondent would submit that this case is irrelevant for the purposes of reviewing the case at hand.

In *State v. Whisner*, 351 N. W. 2d 750 (Ohio 1976), the Ohio Supreme Court dealt with a state regulation as to approved schools which could only be described as pervasive, all-encompassing, and self-contradictory. Significantly, in *State, ex rel. Nagal v. Olin*, 415 N. E. 2d 279, 288 (Ohio 1980), the Ohio Supreme Court approved of the simple North Dakota regulatory scheme as set forth in Section 15-34.1-03 (1), N. D. C. C., and recommended that scheme to the Ohio Legislature.

In *State v. LaBarge*, 357 A. 2d 121 (Vt. 1976), there wasn't even a claim as to any infringement upon the free exercise of religion as guaranteed by the constitution. Finally, in *State v. Massa*, 231 A. 2d 252 (Morris County Court 1967), we have a decision of a county court which predates *Wisconsin v. Yoder, supra*, by some five years.

Petitioners state that the decision of *Wisconsin v. Yoder, supra*, has caused confusion among the states in determining their interest in education. That just is not so. The states are more than capable in determining what their interests in education are and are not. Confusion has not been created by the decision of this Court in *Wisconsin v. Yoder, supra*. Indeed, this decision has caused uniformity in the states as all such issues are being resolved by the same three-prong analysis set down by this Court.

Instead, petitioners simply do not like the decision of the North Dakota Supreme Court in upholding the State's compelling interest in education as carried out by the teacher certification requirement. Petitioners are attempting to convince the United States Supreme Court to step in and tell the State of North Dakota, along with all other

49 states, exactly how a state may carry out its compelling interest in seeing that its youth are educated.

In the final analysis, what the petitioners are seeking is a mandate from the United States Supreme Court to the State of North Dakota, and all other states, directing that standardized tests showing that children are learning will be an irrefutable presumption that the State's compelling interest in education is being satisfied despite any state requirements for certified teachers. Petitioners have attempted to achieve this through the legislature and have failed. They have attempted to achieve this goal by defending this action through the County Justice Court, the District Court in the South Central Judicial District of the State of North Dakota, and the North Dakota Supreme Court. Petitioners have failed to achieve this goal at every attempt and are now attempting to lure the United States Supreme Court into this quagmire.

Respondents would respectfully submit that the United States Supreme Court should decline to act as a "super legislature." The states are more than qualified and capable in determining what their interests are in education and the best method to further those interests. So long as the free exercise of religion clauses of the United States and other state constitutions are not violated, as determined by application of the three-prong analysis in *Wisconsin v. Yoder, supra,* it is best to leave this matter up for determination by the individual states. The State of North Dakota has better information at its disposal necessary to determine, identify, and promote the state's compelling interests in education.

CONCLUSION

Petitioners have failed to show that the decision of the North Dakota Supreme Court violated any of their religious rights guaranteed to them by the First Amendment to the United States Constitution or by the North Dakota Constitution. Furthermore, the petitioners have failed to show that this decision is in conflict with the decisions of other state courts, of a federal court of appeals, or in any way conflicts with the applicable decisions of this Court.

For these reasons, a writ of certiorari to review the judgment and opinion of the Supreme Court of the State of North Dakota in this matter should be in all things denied.

Respectfully submitted,

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